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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 291

WISCONSIN MICHIGAN POWER COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh circuit, entered in the above entitled case on June 9, 1952.

The State of Wisconsin through its attorney general, and the Public Service Commission of Wisconsin are also petitioning this Court for a writ of certiorari to review said judgment. The petitioner herein respectfully requests that this petition be considered by the Court in connection with those petitions.

Opinion Below

The opinion of the Examiner of the Federal Power Commission (R. 273) is unreported. The opinion of the Federal

Power Commission (R. 367) is not yet reported. The opinion of the United States Court of Appeals for the Seventh Circuit (R. 451) is reported in 197 F. 2d 472.

Jurisdiction

The judgment of the Court of Appeals was entered on June 9, 1952 (R. 464). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Questions Presented

1. Whether the Federal Power Commission has jurisdiction under the Federal Power Act over the sale of electric energy to municipalities.

2. Whether the Federal Power Commission has jurisdiction under the Federal Power Act over the sales of electric energy at wholesale, where comparatively small amounts of interstate energy are transmitted across a state line, transformed to a substantially lower voltage, commingled with much larger amounts of intrastate energy, and then sold to several wholesale customers from a loop line that also serves several retail customers and distribution centers.

3. Whether the Federal Power Commission can make a conclusive and binding determination ex parte as to what has and has not been filed with it.

4. Whether the Power Company has charged rates in excess of those on file with the Federal Power Commission.

Statutes Involved

The pertinent statutory provisions are as follows:

Material portions from the Federal Power Act. (16 U. S. C. sec. 791a et seq.; 49 Stat. 838).

"Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * * * *

"(3) 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined;

"(4) 'person' means an individual or a corporation;

* * * * * * *

"(7) 'municipality' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * * * *

"(15) 'State commission' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality; * * *" (16 U. S. C. sec. 796 (3), (4), (7), (15); 49 Stat. 838).

"*Section 20.* That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the

States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

"The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

"In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be

claimed or allowed for the rights granted by the commission or b this Act''. (16 U. S. C. sec. 813, 41 Stat. 1073)

''*Section 201.* (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

''(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

''(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

''(d) The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale.

"(e) The term 'public utility' when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

"(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto". (16 U. S. C. sec 824 (a), (b), (c), (d), (e), (f), 49 Stat. 847)

Statement

Wisconsin Michigan Power Company, (hereinafter referred to as the Power Company) is engaged in the production, transmission, distribution and sale of electric energy in the States of Wisconsin and Michigan. Its system consists of a Northern Division and a Southern Division. The Northern Division is located in the peninsula section of Michigan and in northern Wisconsin. The Southern Division is located entirely in Wisconsin (R. 269). Generating plants are located in both Divisions. The Divisions are not contiguous, but are interconnected by means of a 132 kv transmission line. The two Divisions are about 50 miles apart (R. 40).

Electric energy is transmitted in either direction on the 132 kv line, and the amount flowing in each direction is measured separately. During a twenty-two month period studied by the Commission's staff, 17.4% of the total electric energy sold in the Southern Division came from energy generated in the State of Michigan, and 13.1% of the energy sold in the Northern Division came from energy generated in the State of Wisconsin (R. 284). The Power

Company served seven wholesale customers (now six) in Wisconsin and one in Michigan, which are the subject of this dispute.

The energy coming from Michigan to Wisconsin is transformed after it reaches the Company's Southern Division in Wisconsin from 132 kv to 33 kv and then proceeds on a 33 kv loop line, and branches thereof, including 13.8 kv lines, which serve numerous retail customers in addition to the seven wholesale customers in question[1] (R. 160-162, 370). Upon the occasions when such transformed electric energy is to be employed for energizing the 33 kv loop and its subsidiary branches, that energy becomes instantaneously commingled with substantially greater quantities of electric energy produced locally within Wisconsin and the resulting composite energy is used to supply the demands of numerous retail customers surrounding the locations of the seven wholesale customers. The amount of the transformed energy induced from energy having its origin in Michigan can afford no index as to the amount of energy of that type, if any, which actually finds its way onto any specific consumer's premises in view of the diversity of the needs of the numerous retail customers.

Five of the eight wholesale customers are municipalities in the State of Wisconsin, namely, the cites of Menasha, Kaukauna, Shawano, New London and Clintonville (R. 370).

The sales to these seven wholesale customers have always been regulated by the Public Service Commission of Wisconsin. The rates applied to these sales were predicated upon a rate structure established by the Wisconsin Com-

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[1] The statement of facts and the arguments hereinafter made will be specifically applied to the Wisconsin customers, with the intent that the same contentions and arguments apply to the sale of electrical energy to the one wholesale customer in Michigan in respect of energy generated in Wisconsin and commingled with Michigan energy.

mission and applicable to both large industrial users as well as to these wholesale customers.

On December 15, 1947 the Federal Power Commission issued an order (Docket No. IT-5497, 1 FPC 699) in which it found the Power Company to be a "public utility" within the meaning and subject to the requirements of Part II of the Federal Power Act (R. 1). Since 1938 the Power Company has filed with the Commission, pursuant to the latter's direction, all contracts for the sale to the wholesale customers (R. 83, 84). Such contracts all contained coal-factor clauses providing for a fluctuation of .03¢ per kwh for each 1¢ fluctuation in the cost of 1,000,000 B. t. u. compared to a base of 20¢.

Early in 1945 the Power Company, after conferences with and at the suggestion of the Wisconsin Commission, exchanged correspondence with that Commission as the result of which the Power Company placed a temporary ceiling upon the upward operation of the coal-factor clause (R. 294, 377). Later in that year the Power Company agreed to permanently reduce the reduction factor from .03¢ to .02¢ (R. 294). The Power Company sought to file this permanent reduction with the Federal Power Commission, but had no intention of filing the temporary ceiling, and in correspondence with the Commission the Company protested the suggestion that the ceiling be regarded as a part of the filing (R. 298). On December 18, 1948 the Wisconsin Commission by order removed the temporary ceiling, and established Milwaukee instead of Appleton as the price basing point (R. 295). The Power Company sought to make filings with the Federal Power Commission, incorporating this order of the Wisconsin Commission. The Federal Power Commission suspended the filings and they were later withdrawn (R. 51-53, 54).

Charges under the proposed filing have been collected up to the present time but a statement has been placed upon

the invoices showing a controversy as to which regulatory body has jurisdiction (R. 53).

The result of the Power Company following the rates prescribed by the Wisconsin Commission in respect of the coal-factor clause has been to save the wholesale customers about $314,000 from March 1, 1945 to January 1, 1949 (R. 121-122).

The Power Company was ordered to show cause why the Commission should not determine that the sales at wholesale were subject to its jurisdiction, why the Company should not cease and desist from charging rates other than those on file with the Commission, and why it should not take steps to refund overcharges (R. 1-6). The State of Wisconsin and the Public Service Commission of Wisconsin intervened in the proceeding (R. 6, 13-15, 19).

The Examiner found and determined (so far as is herein pertinent) that (1) the sales in question to the wholesale customers other than the five municipalities, constituted sales "of electric energy at wholesale in interstate commerce" within the meaning of Section 201 (R. 290, 291, 302), (2) that the Commission had jurisdiction over such sales (R. 290, 291, 302, 303), (3) that the State of Wisconsin had no jurisdiction over such sales (R. 290, 302, 303), (4) that the sales to the five municipalities were not sales of electric energy at wholesale within the meaning of Section 201, but the Commission had jurisdiction under Section 205 to prevent discrimination among the wholesale customers (R. 296, 297, 302), (5) that the Commission had no jurisdiction over the sales under Section 20, as no showing had been made that the States of Wisconsin and Michigan were unable to agree (R. 287, 288), (6) that the 1945 temporary ceiling was not filed with the Commission (R. 294, 298), and the Company since 1945 had not charged rates in excess of the rates on file with the Commission, but in fact had charged less than the filed rates (R. 298, 299).

All of the parties filed exceptions to the decision of the Examiner. The Commission issued its opinion and order on June 1, 1951 (R. 367-384), in which it affirmed the determination that the sales in question were subject to its jurisdiction under Section 201. The Commission went further, however, and found the Examiner to be in error in determining that the sales to the five municipalities were not sales at wholesale under Section 201 (R. 376, 377), and also that he was in error in finding that the 1945 temporary ceiling had not been filed and that the Company had not charged rates in excess of those on file (R. 377-379, 383). The Commission also reversed the Examiner and found that it did have jurisdiction under Section 20 (R. 375-376).

On a petition to review the order of the Commission, the Circuit Court of Appeals affirmed the order in all respects (R. 463) 197 F. 2d 472, 480.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the Federal Power Commission has jurisdiction over the sales of electric energy to municipalities.

2. In holding that all of the sales to the eight customers in question were sales "of electric energy at wholesale in interstate commerce" within the meaning of Section 201 of the Federal Power Act.

3. In holding that the sales in question are subject to the Commission's jurisdiction under Section 20 of the Federal Power Act.

4. In holding that the 1945 temporary ceiling was filed with the Commission.

5. In holding that the Power Company charged rates in excess of those on file with the Commission.

Reasons for Granting the Writ

1. The decision of the lower court is the first judicial interpretation of the Federal Power Act with respect to whether sales to municipalities are within the meaning of the Act.

The language of the Federal Power Act expressly excludes from the jurisdiction of the Commission sales at wholesale to municipalities. Under Section 201(b) jurisdiction is conferred on the Commission over "the sale of electric energy at wholesale in interstate commerce".

In Section 201(d) Congress defined such sales as follows:

> "The term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to *any person* for resale." (Emphasis supplied.)

Section 3(4) defines "person" to be "an individual or a corporation". Section 3(3) defines a "corporation", and it expressly provides that a corporation shall not include a municipality. Congress was most explicit in providing that a municipality was not a "person" within the meaning of Section 201(d). In addition, Congress provided in Section 201(f) that:

> "No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

The holding of the lower court (R. 461, 197 F. 2d 472, 479), that such provisions of the Act as Section 306 (allowing complaints to be filed) and 313(a) (allowing aggrieved

parties to have judicial review) would otherwise be meaningless insofar as they include states and municipalities, we respectfully submit is not correct. Whether or not a state or municipality itself purchases power at wholesale is not at all the determinative fact as to whether it can file a complaint or seek judicial review of an order. There are numerous cases in which a municipality or a state files a complaint or seeks judicial review as a representative of its citizens who are retail consumers. Furthermore, a state or municipality in its capacity as a retail consumer would have a definite interest in controversies involving wholesale rates paid by the utility supplying that state or municipalities since the level of such rates would directly affect the price paid by the state or municipality as a consumer.

It is not unique or unusual that Congress exempted states and their political subdivisions from the provisions of the Federal Power Act. Historically such has usually been the practice. Congress whenever possible has given due recognition to the sovereignty of the states. For example the Taft-Hartley Act expressly excludes the states and their political subdivisions. 29 U. S. C. § 152.

That the statute is founded upon a sound public policy is apparent when we consider the dual nature of our Government. It has been frequently observed by high authority that under the American Constitutional system there is a dual form of sovereignty—the sovereignty of the nation and the sovereignty of the individual states. Each is supreme when acting within the sphere of its exclusive jurisdiction. It must be remembered that if the Federal Power Commission prescribes the rate which a public utility may charge a state or its municipalities, it thereby prescribes the price which they must pay for the services furnished by the public utility. Thus, the state and its municipalities are no longer free agents in respect to the prices which

they may be required to pay for such services, but the Federal Government dictates to them the prices they must pay. If the Federal Government has power to prescribe the rates which a state or its municipalities must pay, its power in this regard is unlimited because there are no restrictions in the Federal Constitution. It has been stated that ours is "an indestructible union composed of indestructible states". This Court has on many occasions held Federal statutes unconstitutional when they encroached upon the so-called prerogatives of state governments. At an early date this Court invalidated a Federal statute which imposed a tax upon instrumentalities of a state government. The court declared that "the power to tax is the power to destroy", and Congress, under the Constitution, is without power to destroy a state government. The income of bonds issued and sold by municipalities is still regarded as exempt from federal taxation under this constitutional doctrine. Historically, it has not been the policy of Congress to regulate the activities of states and their political subdivisions. It has not sought to dictate to them the prices which they shall pay for property or services necessarily used by them. Congress has always sought to recognize the freedom of states and their political subdivisions unless their actions infringed upon guaranties to other persons included in the Fourteenth Amendment.

In plain and unambiguous language Congress has provided that sales to municipalities are not within the jurisdiction of the Commission. Yet the lower court holds that the Commission does have jurisdiction as Congress never intended to exclude such sales from the jurisdiction of the Commission. The lower court erroneously concluded:

> "* * * After consideration of the legislative history of the respective provisions of the Act, we think the apparent inconsistency was an oversight and that Congress never intended to exclude from its definition

> of sales for resale, sales to municipalities for resale. When we bear in mind the gradual development of the various provisions of the Act and the policy of the statute as a whole, we think that the 'slip' was inadvertent and that we must so interpret the Act as to make effective its over-all purpose, despite the literal words of Part I". (R. 461, 197 F. 2d 472, 479)

It is well established that when the language of a statute is plain and unambiguous, the courts must give effect to such language, and are precluded from construing such language.

In *United States* v. *Ewing*, 184 U. S. 140, the court stated as follows:

> "It is said that as thus construed the statute leads in many cases to great injustice, and hence such construction should not be adopted. The difficulty is that any other construction violates the clear directions of the law, and although the result may be to withhold its benefits from some who might be regarded as otherwise entitled to it, yet we cannot for that reason alter its terms so as to include them, and thus ourselves enact instead of construing the law". (p. 149)

In *Caminetti* v. *United States*, 242 U. S. 470, the court said:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. * * *" (p. 485).

The court in *Commissioner of Immigration* v. *Gottlieb*, 265 U. S. 310, said as follows:

> "* * * The case, as evidence shows, is one of peculiar and distressing hardship, and it is not unnatural

> that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to the respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but to follow it, without regard to the consequences". (p. 313)

Even if there is an obvious omission or defect in the statute, this court has said that only the legislature can supply the omission or correct the defect:

> "* * * We cannot insert the exception. When a provision is left out of a statute, either by design or mistake of the Legislature, the courts have no power to supply it. To do so would be to legislate and not to construe. 'We are bound,' says *Mr. Justice* Buller, in *Jones vs. Smart*, 1 T. R. 44, 'to take the Act of Parliament as they have made it;' and *Mr. Justice* Story, in *Smith vs. Rines*, 2 Sumn. 354, 355, observes: 'It is not for courts of justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation.'" (*Hobbs vs. McLean*, 117 U. S. 567, 579-580)

Mr. Justice Brewer, speaking for this court in *United States* v. *Goldenberg*, 168 U. S. 95, at page 103, said:

> "* * * No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

The decision of the lower court will have a profound effect upon the hundreds of electric utilities which sell at wholesale to municipalities throughout the United States. It is the first judicial interpretation of the Federal Power Act relating to this subject matter. In the court's opinion it concedes that this interpretation in relation to municipalities is contrary to the plain words of the statute, and it justifies its decision wholly upon the ground that there was an alleged inadvertent "slip" in draftmanship.

The settlement of this question by this court is plainly in the public interest.

2. A complete determination of the questions presented is of the utmost importance in the administration of the Federal Power Act. The impact of the holding of the lower court is that when a public utility engaged in the distribution of electrical energy has but the slightest trace of extra-state energy in its system, any and all sales by such utility to wholesale customers are subject to the jurisdiction of the Federal Power Commission. Under the court's holding, the Federal Power Commission has complete and plenary jurisdiction over such sales, and the state commissions are rendered powerless, even though they regulate every other phase of the utility's operations.

The Power Company has thousands of retail customers and only a few wholesale customers. The Wisconsin Commission has regulated the Company for many years, not only as to the rates it charges such customers, but also its accounting methods, its security issues, its plant expansions, and many other phases of its business.

The decision of the Court of Appeals seems to be in direct conflict with the intent of Congress as clearly expressed in the Federal Power Act, where it provided in Section 201 (a):

> "* * * such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.",

and in Section 201 (b):

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but shall not apply to any other sale of electric energy* or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across

> a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." (Emphasis supplied)

There is no question but what Congress intended to give the Federal Power Commission jurisdiction only over those matters which were not subject to State regulation.

> "*The bill takes no authority from State commissions* * * * Probably, no bill in recent years has so recognized the responsibilites of State regulatory commissions as does title II of this bill." (Emphasis supplied) House Report No. 1318, 74th Cong., 1st Sess., p. 7.

We submit that the State of Wisconsin clearly had jurisdiction of these wholesale transactions prior to 1935. It is well established that in the absence of conflicting legislation by Congress, the States have the power to regulate local matters even though interstate commerce may be involved or affected. *Cooley* v. *Port Wardens*, 12 How. (U. S.) 299; *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761. Clearly the sale of energy to these few wholesale customers, of which the interstate energy comprised but a small portion, was but local in nature, and the regulation thereof by the State of Wisconsin was merely incidental to its regulation of the utility's intrastate business.

Unlike many other federal statutes enacted under the Commerce Clause, the Federal Power Act was not intended to place dominant and controlling powers in the hands of

the federal administrative agency. It was not intended that if there was any concurrence of federal and state jurisdiction over a particular situation that the states would yield to the dominant federal powers. This particular Act was unique in that the Federal Power Commission was given jurisdiction only over those transactions over which the states had no power whatsoever.

In 1935 Congress did not choose to completely supersede such incidental regulation by the states, but only to regulate those matters which were completely beyond the powers of the states, as was the situation in *Public Utilities Comm.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. This latter case was cited in the Committee Reports. Senate Rep. No. 621, 74th Cong., 1st Sess., p. 48. However, in cases of incidental regulation by the states where they had power to regulate prior to 1935, by reason of the fact that Congress had not until such year enacted any legislation germane to the problem, Congress expressly provided in its 1935 enactment that the states could continue in the field of incidental regulation. It was clearly within the discretion of Congress to determine how far its regulation was to extend:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 402, 57 L. ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Anno. Cas. 1916A, 18. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy

only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' (Cases Cited)" *Kelly* v. *Washington*, 302 U. S. 1, 9-10.

In the enactment of the Federal Power Act, our national lawmakers apparently recognized that the public welfare would be promoted by [illegible]cal authorities regulate all electric rates which t[illegible]al power to regulate, and that the Federal Go[illegible]hould only regulate those rates which the local [illegible]) authorities were powerless to regulate. The Congressional declaration that "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the state" (Section 201) is clear and simple. We must assume that Congress meant what it said.

It is submitted that the decision of the Court of Appeals will vitally affect almost every electric utility of any substantial size. Certainly almost every such utility has some interstate energy in its system at one time or another. If the lower court's holding is correct, then every sale at wholesale made by the great majority of electric utilities in this country will be subject to the jurisdiction of the Federal Power Commission.

It is submitted that Congress never intended such a far-reaching jurisdiction when it enacted the Federal Power Act.

3. The Commission reversed the examiner and found that it also had jurisdiction over the sales under Section 20. The Court of Appeals did not consider this issue in its opin-

ion, but its approval of the order of the Commission necessarily affirms this determination.

Part I (containing Section 20) applies to licenses, and the Power Company concededly is a licensee. Section 20 provides in part as follows:

> "* * * and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *".

The record clearly shows that Wisconsin has provided a commission to provide the necessary regulation mentioned. The record is void of any facts indicating that the commission of the states of Michigan and Wisconsin are unable to agree. The Federal Power Commission bases its finding solely on its examination of the statutes of Wisconsin and Michigan and being unable to find any provisions authorizing agreements or regulation (R. 376). This finding is wholly immaterial and is not sufficient to cover jurisdiction. All Congress intended was that states, either by identical action or by cooperation, agree in some informal manner. In *Safe Harbor Water Power Co.* v. *Federal Power Comm.*, 3 Cir., 124 F. 2d 800, the court declared:

"If Pennsylvania and Maryland, through their respective public service commissions, have agreed informally, by cooperative or identical actions, to regulate as an integrated stream of electricity the hydroelectric energy produced by Safe Harbor and consumed in Pennsylvania and Maryland, we would conclude that such would be within the purview of the compact clause and the permission given by Congress by Section 20 * * *". (p. 808)

Clearly such an artificial presumption as the Commission has here utilized is wholly insufficient to confer jurisdiction. The burden is on the Commission to prove the requisite jurisdictional facts. It is elemental that a determination of statutory jurisdiction must be supported by established facts appearing in the record and not upon presumed facts. The record in the instant case is completely void of any facts at all relating to any agreement or disagreement between Michigan and Wisconsin. Upon such a record the Commission clearly can not determine that it has jurisdiction.

In any event we submit that if the Federal Power Commission does not have jurisdiction under Part II (Section 201) it does not have jurisdiction under Part I. It has been held that Part I, insofar as it was intended to confer jurisdiction as to interstate wholesale rates, was repealed by Part II.

"* * * Thus, even if Part I was intended to confer jurisdiction upon the states or the Federal Power Commission to regulate interstate wholesale rates, it was to that extent repealed by Part II." (*Pennsylvania W. & P. Co.* v. *Federal Power Commission*, 193 F. 2d 230, 239, aff'd — U. S. —.)

4. If the Company has been guilty of charging rates in conflict with the official rates approved by the Federal

Power Commission, its violation has consisted in charging too little instead of too much. When the Company placed a temporary freeze (which amounted to a rate reduction) upon its coal-factor clause, it did not file such "freeze" with the Commission and the Commission did not give its approval to the same.

Early in 1945 the Power Company agreed, pursuant to informal suggestion made by the Wisconsin Commission, to place a ceiling upon the upward operation of the coal-factor clause equivalent to 27½¢ per 1,000,000 B. t. u. (compared to a base factor of 20¢), with the result that customers received shortly thereafter a rate benefit which none of them had sought. The Power Company and the Wisconsin Commission regarded this as a temporary measure, as is indicated by the fact that no order in the matters was entered by the Wisconsin Commission (R. 139, 140, 141, 205, 206). No filing of the "freeze" arrangement or other notification thereof was given by the Power Company to the Federal Power Commission (R. 139, 140).

On April 19, 1946 the Company sought to file with the Commission an amendment to the wholesale contracts whereby the coal factor was permanently reduced from .03¢ to .02¢ for each 1¢ increase or decrease in the cost of one million B. t. u. The Company clearly did not intend to file the temporary freeze on the upward adjustment of the coal-factor clause. Upon receipt of the April 19, 1946 filing, the Secretary of the Commission addressed a letter to the Company inquiring why the temporary freeze was not also to be included in the contract amendments being filed. Such letter read in part as follows:

> "In view of the foregoing, kindly advise this Commission why the apparent maximum allowable increase of 0.15 cents per Kwh. in the application of the fuel clause adjustment *should not be specified as a provision to be included in the amendments* to the

agreements indicated above * * *'' (R. 93). (Emphasis supplied.)

The Company in its reply letter dated May 6, 1946 unequivocally stated that it was not filing the temporary freeze:

> ''The company *is not desirous of filing the temporary arrangement in the form of amendments to the special agreements* which are referred to in your letter of May 1, for the reason that there may be termination or change of the temporary arrangement at any time that the coal price increases work undue hardship. In most of the special contracts for which supplemental agreements had been filed, rate VII-A has been used as the basis, and in all instances the coal factor clause is uniform.
>
> ''It is hoped that this explanation will clarify the matter sufficiently for your purposes * * *'' (R. 94, 95). (Emphasis supplied.)

The Secretary of the Commission did not reply to this letter (R. 141, 142). Under such circumstances the Company could only assume that the temporary freeze was not on file.

The Examiner expressly found that the Commission staff could not by *ex parte* action convert the information relating to the temporary freeze into a filing against the express will of the Company.

> ''* * * Respondent also denies that it ever filed with this Commission the 'freeze' changes, which it deemed to be temporary. The record supports Respondent's position in that regard. Its letter of May 6, 1946, to this Commission expressly stated that the information furnished was not intended as a filing. The Commission Staff's contention that it constitutes a filing rests solely upon internal Staff handling of this data as 'supplements', contrary to the expressed intent of Respondent and without Respondent's assent

or knowledge. Such action of placing such data as approved supplements in files of the Commission so as to create the appearance of a filing under the Act has no legal significance and does not in any manner bind the Respondent. Although Respondent was in error in intentionally not filing the 'freeze' changes and in intentionally and openly refusing to 'file' them, it does not follow that the ex parte action of the Staff converted the information into a filing under the Act against the will of Respondent" (R. 298).

The finding of the Commission (reversing the Examiner) that the 1945 temporary ceiling on the coal-factor adjustment had been filed with it in 1946 is based upon a principle unsupported by any authority of law, that the Commission can make a conclusive and binding determination *ex parte* as to what has and has not been filed with it. The correspondence that passed between the Power Company and the Commission clearly indicates that the Power Company did not intend to include the 1945 temporary ceiling as part of its filing in 1946 (R. 93-96), and the Examiner so found (R. 294). The Commission reversed this finding, and seems to indicate that the intention of the Power Company was immaterial, and that the fact that the Commission staff had included it as part of the filing was conclusive (R. 378). The Court of Appeals affirmed this finding (R. 463, 197 F. 2d 472, 480).

Even assuming that the Commission does have the power to require the establishment of a reserve, the Power Company submits that the Commission erred in failing to recognize that the Company from March 1, 1945 (effective date of temporary freeze), to May 23, 1946 (date of alleged filing of temporary freeze), gave its wholesale customers, as well as all of its large user customers, a rate reduction by applying the temporary ceiling on the upward operation of the coal-factor clause. The Commission does not claim that

this temporary freeze was on file during this period. Accordingly, if the Commission is to indirectly require the Company to refund amounts charged in excess of the rates on file since January 1, 1949, credit must be given for the amounts representing under-charges prior to May 23, 1946, where the full filed rate was not applied.

The Examiner was fully aware of the inequities of the proposal of the Commission Staff in this regard and he so stated in his decision:

> "The proposed action of basing upon the date January 1, 1949, would be clearly unfair, tending to give wholesale customers inequitable credits for elements tending to increase the charges without proper counter-charging the accounts with amounts Respondent refrained from collecting under the 'freeze' and amounts that represented decrease in rates and charges between 1945 and the present time" (R. 299).

It is respectfully requested that if a writ of certiorari be granted, this Court review the facts relating to this filing. The further finding that the Power Company has charged rates in excess of those on file depends entirely upon the finding as to the filing of the temporary ceiling.

Conclusion

A matter of widespread importance in the appropriate and proper construction of the Federal Power Act is presented in the issues now raised. Because of the interconnection of the majority of public utilities transmitting and distributing electric energy throughout the nation, the ascertainment of the correct limits of the jurisdiction of the Federal Power Commission, and the residual jurisdiction of state regulatory commissions is a matter of prime importance. The legislative history of the Federal Power Act has heretofore received the consideration of this Court in conjunction with jurisdictional issues which may ap-

propriately be termed subsidiary or collateral as distinguished from the instant issues which are direct and primary. The exercise of jurisdiction by this Court is justified to enable the Federal Power Commission, the state regulatory commissions and the public utility industry to be informed in respect of the extent to which it can be correctly said that the Congress intended to extend the scope of the Federal Power Act.

Respectfully submitted,

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(3272)

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IN THE

Supreme Court of the United States

October Term 1951

STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATE OF WISCONSIN and PUBLIC SERVICE COMMISSION OF WISCONSIN,

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vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, entered in the above entitled case on June 9, 1952.

Opinion Below

The opinion of the Court of Appeals (R. 451) had not been reported in the Federal Reports up to time of preparation of this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on June 9, 1952. R. 465. The jurisdiction of this court is invoked under 16 U. S. C. sec. 825 l(b) and 28 U. S. C. sec. 1254(1).

QUESTIONS PRESENTED

A. *Questions forming the basis for petition for writ of certiorari.*

Whether the dividing line between conflicting jurisdictional claims between state and federal regulatory agencies under Part II of the Federal Power Act (16 U. S. C. secs. 824-824h) is to be determined on the basis of whether sales of interstate electric energy involved are "wholesale" or "retail"?

2. Whether, irrespective of the particular facts, *all* sales of electric energy made by Wisconsin Michigan Power Company to distributors for resale are subject only to Federal Power Commission regulation under Part II of the Federal Power Act (16 U. S. C. secs. 824-824h)?

3. Whether *all* sales of electric energy in interstate commerce for resale, including those by Wisconsin Michigan Power Company here involved, are beyond the constitutional powers of the State under the Commerce Clause and are subject only to federal regulation, even in the absence of Congressional action?

4. Whether a sale of electric energy in interstate commerce for resale is, by the fact it is for resale alone, irre-

spective of the amount of energy sold or any other fact, a matter affecting the national interest?

5. Whether the State of Wisconsin can constitutionally regulate rates for sales of electric energy by Wisconsin Michigan Power Company to certain specified customers involved in this case who are located in Wisconsin who sell said electric energy for resale?

6. Whether the Federal Power Commission has jurisdiction under Sections 201(b) and 205 of the Act (16 U. S. C. secs. 824, 824d) to regulate rates for sales of electric energy (which may at any particular moment be either all intrastate in origin or all interstate or a commingling of both) by Wisconsin Michigan Power Company to specified customers for purposes of resale where such sales are made after the energy is reduced in voltage and from lower voltage lines from which energy is also sold to various other ultimate customers at retail?

7. Whether Wisconsin Michigan Power Company may be held to be a "public utility" as defined in Section 201(e) of the Federal Power Act (16 U. S. C. sec. 824(e)) for the purposes of this case, i.e. with respect to jurisdiction to fix rates for specific sales of interstate electric energy to specified customers for purposes of resale, where it appears that it was determined to be a "public utility" by the Federal Power Commission in 1937 (1 F. P. C. 699) within the meaning of that term as it appears in Section 203(a) of the Act (16 U. S. C. sec. 824(b)) in connection with the merger of certain facilities, or by reason of the existence of a 132 KV transmission line in a part of its system but not immediately used to make sales to said specified customers for resale?

8. Whether the lower voltage lines used to make such sales to the specified customers here involved for resale, from which lines in Wisconsin, energy is sold to various other ultimate customers at retail, are "facilities used in local distribution" within the meaning of Section 201(b) of the Act (16 U. S. C. sec. 824(b))?

9. In event such lower voltage lines are "facilities used in local distribution" whether such sales made by the Company the specific customers for resale are subject to jurisdiction of the Federal Power Commission for ratemaking purposes under Sections 201 and 205 of the Act (16 U. S. C. secs. 824, 824d)?

10. Whether continued regulation of rates for sale of such electric energy to such of said specified customers who are located in Wisconsin by the State of Wisconsin through its regulatory agencies (Railroad Commission of Wisconsin and its successor, Public Service Commission of Wisconsin) in excess of twenty years precludes Federal Power Commission jurisdiction to regulate rates for the identical sales?

B. *Questions in addition to the above which petitioners will raise if certiorari is granted.*

1. Whether "facilities used in local distribution" as used in Section 201(b) of the Federal Power Act (16 U. S. C. sec. 824(b)) begins only when the wholesale customer to whom Wisconsin Michigan Power Company sells energy in turn resells it, and cannot include anything before such point?

2. Whether "facilities used in local distribution" as used in Section 201(b) of the Act (16 U. S. C. sec. 824(b)) includes only facilities used for making sales at retail?

3. Whether sales and distribution at retail are only local in character and constitute only local distribution?

4. Whether "facilities used in local distribution" as used in Section 201(b) of the Act (16 U. S. C. sec. 824(b)) means only facilities used for making resale and distribution to customers, jurisdiction over which is left to the States, and whether local distribution cannot include "any transmissison" occurring before the wholesaler who resells at retail is reached?

5. Whether the sale of electric energy to a municipality for resale is a "sale at wholesale" as defined in Section 201(d) of the Federal Power Act (16 U. S. C. sec. 824(d)) in the light of definitions in Sections 3(3), 3(4) and 3(7) and 201(b) of the Act (16 U. S. C. secs. 796(3), (4) and (7) and 824(b))?

6. Whether decisions of the Supreme Court stating the intent and purpose of and construing the Natural Gas Act (15 U. S. C. secs. 717-717w) are controlling as to the intent and purpose and meaning of the Federal Power Act (16 U. S. C. sec. 791a, et seq.)?

STATEMENT

1. *Case presents jurisdictional conflict between state and federal regulatory agencies.*

The Federal Power Commission issued an order on June 1, 1951 purporting to assume jurisdiction to prescribe rates for electric energy sold in the State of Wisconsin by Wisconsin Michigan Power Company to the Cities of New London, Shawano, Clintonville and Kaukauna and to the Wisconsin Public Service Corporation and Oconto Electric Cooperative, and in the State of Michigan to Upper Peninsula Power Company, for purposes of resale.

The rates charged for sales to the Wisconsin customers were those fixed by the Public Service Commission of Wisconsin by orders dated December 18, 1948 and December 23, 1948 (R. 117-118), and for the Michigan customers by the Michigan Commission. Regulation by Wisconsin has been continuous since said customers first purchased energy, the earliest being Kaukauna who became a customer on August 1, 1920, and has been exercised both before and after interstate energy was introduced in the system in December 1926. R. 78, 79, 118. In recent years the rate charged was determined in part by a "coal clause" factor which made the rate vary according to the price of coal. Adjustments in said coal clause factor were made at the initiative of the Wisconsin Commission, the effect of

which was to save the Wisconsin wholesale customers previously named about $314,000 gross from March 1, 1945 to January 1, 1949.[1] R. 122. Rate increases granted in December 1948, cost said customers about $60,000 annually thereafter but any increase to the date of institution of the litigation was less than the rate for energy on February 28, 1945, at which time the coal clause adjustments commenced. R. 123.

2. *Operations of Wisconsin Michigan Power Company giving rise to jurisdictional conflict.*

Wisconsin Michigan Power Company, a Wisconsin corporation, is a licensee under Part I of the Federal Power Act (16 U. S. C. secs. 791a-823) as to four specified dams (R. 137) and was determined to be a "public utility" on December 15, 1937 in Federal Power Commission Docket I. T. 5497 (1 F. P. C. 699) within the meaning of Section 203 of the Federal Power Act (16 U. S. C. sec. 824b) with regard to the acquisition of certain properties.

It operates properties known as the "Northern Division" in the upper peninsula of Michigan and adjacent in Wisconsin and the "Southern Division" entirely in east central Wisconsin known as the "Southern Division", for

---

[1]The Company filed rate information with the Federal Power Commission because of its status as a "licensee" under Part I of the Federal Power Act (16 U. S. C. secs. 791a-823) and also because it was claimed a "public utility" for purpose of acquiring certain properties in Federal Power Commission Docket I. T. 5497 (1 F. P. C. 699). (R. 83-86, 142, 144-147) The Power Commission was advised of the coal clause adjustment resulting from Wisconsin regulatory action which resulted in a lower rate. The Company specifically stated by letter to the Secretary of the Federal Power Commission this information concerning the coal clause adjustment was not intended as a "filing" (R. 93-97) and the presiding examiner so stated. R. 298. Now the Power Commission claims this was a "filing" and thus in effect attempts to take credit for a reduction in rate brought about by the Wisconsin Commission.

the generation and sale of electric energy both at retail and wholesale. The two divisions are interconnected by a 132 KV line extending from Twin Falls Substation on the north to a substation near Stiles, Wisconsin and thence south to the City Limits Substation near Appleton. R. 39, 40, 218, 222.

The Northern Division contains 9 generating plants, 8 hydro and 1 Diesel in Michigan and 1 in Wisconsin. The Southern Division contains 2 hydro and 1 steam and hydro generating plants all in Wisconsin. The entire system is operated on a coordinated basis. R. 154, 157. When water conditions are favorable hydro generated energy is sent from the Northern to the Southern Division, and when unfavorable energy is sent from the Southern to the Northern Division. R. 227. At any one moment it is possible that energy delivered to a customer in the Southern Division (where the Wisconsin wholesale customers are located) could be energy all generated in Wisconsin, or all generated in Michigan, or a commingling of both. R. 164, 165, 173, 247.

In the period from July 1948 to April 1950 the percent of Michigan generated energy delivered in the Southern Division ranged from zero to a high of 58.89 percent, the composite being 17.4 percent, while the percent of Wisconsin generated energy delivered in the Northern Division ranged from a low of 5 percent to a high of 36 percent, the composite for said period being 13.1 percent.

Five of the wholesale customers located in Wisconsin specified in the order to show cause (Cities of New London, Shawano, Clintonville and Kaukauna and Oconto Electric Cooperative) are served from a so-called 33 KV

"loop" line or other 33 KV lines interconnected therewith, and the remaining (Wisconsin Public Service Corporation) is served at a point north of Gillett from a 13.8 KV line interconnected with one of said 33 KV lines.[2] R. 128, 132, 162, 163, 171, 222, 232-6. The function and purpose of said 33 KV "loop" lines or 33 KV lines and lower voltage lines interconnected therewith is to deliver energy to various points thereon to various customers including certain ultimate customers who take at retail. R. 169, 176.

There are 8 customers served *at retail* (and hence are ultimate customers) off said 33 KV "loop" or 33 KV lines interconnected therewith, all except 2 of which take at 33 KV, and 20 customers served *at retail* served off the 13.8 KV line which serves Wisconsin Public Service Corporation near Gillett. R. 160-162. In the first four months of 1950 said *retail* customers purchased about twice as much energy as the Wisconsin wholesale customers involved. R. 256. Engineering-wise, the facilities which serve the aforesaid retail customers differ in no way from those that serve the wholesale customers. R. 164.

3. *The result below.*

The Court of Appeals for the Seventh Circuit affirmed the order of the Federal Power Commission asserting jurisdiction over said sales under Sections 201(a) and (b) and 205 of the Federal Power Act. 16 U. S. C. secs. 824(a) and (b) and 824d. The result arrived at made it unnecessary to consider the question of jurisdiction under Part I of the

[2]Comparable lower voltage lines that serve Upper Peninsula Power Company in the upper peninsula of Michigan. R. 132, 222.

Act (16 U. S. C. secs. 791a-823) by virtue of the Company's status as a "licensee."

REASONS FOR GRANTING THE WRIT

1. This case presents a jurisdictional conflict between the Federal Power Commission and the State of Wisconsin which through its regulatory agency (Public Service Commission of Wisconsin, and its predecessor, the Railroad Commission of Wisconsin) has in fact up to the time of the present litigation regulated and still claims the power to regulate the rates for sales of electric energy by Wisconsin Michigan Power Company, a Wisconsin created corporation, to the 6 Wisconsin wholesale customers, 4 of which are Wisconsin municipalities and as such arms of the State and the remaining 2 are Wisconsin created corporations.

This matter of conflicting jurisdictional claim between state and federal regulatory agencies is in a field which has been characterized as "one of the recurring phases of our federalism and involves striking a balance between state and federal authority in one of the most sensitive areas of government." *Palmer v. Massachusetts*, (1939) 308 U. S. 79, 83. The court has always been diligent in seeing that the respective federal and state authority be kept in their allotted field and in not permitting federal encroachment upon state regulatory efforts unless plainly called for by affirmative grant. *Connecticut Light & Power Company v. Federal Power Comm.*, (1945) 324 U. S. 515, 532; *Davies Warehouse Co. v. Bowles*, (1944) 321 U. S. 144, 154-156; *Palmer v. Massachusetts*, (1939) 308 U. S. 79, 83-4. In the case last cited it is said page 84:

> "* * * But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress. * * *"

2. Specifically this case involves the construction of Part II of the Federal Power Act (16 U. S. C. secs. 824-824h) including the application of and the effect to be given to the portion of Section 201(b) of the Act (16 U. S. C. sec. 824(b)) which provides the Power Commission shall not have jurisdiction over "facilities used in local distribution," which provision this court said in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 530-1, was the provision by which Congress was trying to apportion the federal and state jurisdiction over the industry. *We submit the Federal Power Commission and the Court of Appeals failed to give any effect to the test actually laid down by this court in said case but instead adopted another test, namely, whether the sales are at wholesale or retail, it being concluded irrespective of any other facts that wholesale sales were subject to federal regulation and retail sales by the states.*[3]

3. The problem here involved, i.e. whether the State of Wisconsin or Federal Power Commission can regulate certain sales of electric energy, a portion of which is inter-

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[3]This is based on what we submit is an erroneous constitutional doctrine adopted by the court to the effect **all** wholesale sales of electric energy irrespective of the facts of the particular case are beyond the constitutional powers of the state, discussed pages 17-19, **ante**.

state in origin, for resale is one which will increasingly recur in varying situations not only in Wisconsin but elsewhere, and it is necessary that the line between federal and state regulatory authority be delineated by this court as a court of final resort in a manner consistent with Part II of the Federal Power Act (16 U. S. C. Secs. 824-824h) and the previous decision of this court in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515. By reason of modern day concepts of the electric business there has been and is a growing tendency to interconnect all electric generation and distribution systems, so that in the event of emergency, power will be available from alternative sources. As a result of such interconnection cases will arise where more or less interstate energy may come into a particular company's system. It is normal for every company to sell some electric energy at wholesale, and in the event, due to the fact some interstate energy may be involved due to said interconnection, the question will arise as to whether the state regulatory agency or the Federal Power Commission has jurisdiction to regulate the rate for said sale. If, as the Court of Appeals in effect concluded in the instant case, the line of demarcation is whether the sale is "wholesale" or "retail" (which we submit is clearly erroneous and contrary to what this court said in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 530-1, was the proper test for resolving the conflict between state and federal regulatory authorities, for reasons subsequently stated herein), then the result will be to extend federal jurisdiction over such wholesale sales no matter how insignificant they may be in fact when they are rated by the test of whether they affect the "national" or "local" interest.

4. In arriving at its end result, in addition to basing its decision on the "wholesale" "retail" sale test, the Court of Appeals also may have been influenced by the proposition that if a company is a "public utility" as defined in Section 201(e) (16 U. S. C. sec. 824(e)) for one purpose, by reason of the ownership of *some* facility somewhere in its system used for the transmission of interstate energy, it is such for *all purposes* irrespective of the facts of the particular case, *which also renders nugatory the actual test laid down by Congress in passing Part II of the Federal Power Act* (16 U. S. C. secs. 824-824h) *to determine said dividing line between state and federal jurisdiction.*

5. In *Connecticut Light & Power Co. v. Federal Power Comm.,* (1945) 324 U. S. 515, 529-531, the court held the provision that the Federal Power Commission shall not have jurisdiction over "facilities used in local distribution" in Section 201(b) of the Act (16 U. S. C. Sec. 824(b)) was (1) a limitation on jurisdiction of the Power Commission, (2) was the standard by which Congress was trying to apportion conflicting jurisdictional claims of state and federal regulatory agencies over the industry, and (3) was a provision which "the Commission must observe and the courts must enforce."

6. The reasons why the views of the Court of Appeals renders nugatory the test laid down by Congress to delineate the line between state and federal jurisdiction are as follows:

a. To make the case turn on whether the sales are "wholesale" or "retail" so as to conclude, as the Court of Appeals does, that all wholesale sales are subject to federal regulation and the retail sales are subject to state

regulation, renders the limitation of Federal Power Commission jurisdiction over "facilities used in local distribution" in Section 201(b) of the Act a nullity since there would be no situation in which it could be applied. This is because Section 201(b) (16 U. S. C. sec. 824(b)) states:

> "The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but shall not apply to any other sale of electric energy* * * *." (emphasis ours)

Since by the specific limitation above quoted Part II of the Federal Power Act (16 U. S. C. secs. 824-824h) applies *only* to sales of electric energy at wholesale in interstate commerce, and by *specific provision* shall not apply to "any other sale of electric energy," which can mean only a retail sale to give any meaning and effect to this limitation over "facilities used in local distribution," it must be applied to "carve out" some authority earlier granted in Section 201(b) over wholesale sales. See *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 528, note 6. Otherwise the only other conclusion that could be reached is that the jurisdictional limitation applies to sales at retail, which would not be a sensible conclusion since it is plain from the previous language in Section 201(b) (16 U. S. C. sec. 824(b)) above quoted it has no jurisdiction over retail sales in any event. Such construction would be contrary to the rule that in construing statutes effect will be given to all parts thereof and further that in adopting language Congress did not intend to do a useless act, which certainly would be the case if the jurisdictional limitation is applied to retail sales.

b. To say that once a company is a "public utility" as defined in Section 201(e) (16 U. S. C. sec. 824(e)) by reason of ownership or operation of some facility somewhere in its system used in the transmission of electric energy in interstate commerce it is a "public utility" for all purposes and *all* wholesale sales are subject to Federal Power Commission jurisdiction *irrespective* of the particular facilities used to make those sales (which in this case we submit are "facilities used in local distribution" over which the Power Commission has no jurisdiction—Section 201(b) (16 U. S. C. sec. 824(b)) also renders such jurisdictional limitation ineffective as a practical matter. The reason is because *if* such concept is adopted the only case when any effect could be given to the jurisdictional limitation over "facilities used in local distribution" in Section 201(b) (16 U. S. C. sec. 824(b)) would be if the *entire* plant and equipment of the Company would fall within this designation. As a practical matter this would occur very infrequently since the great bulk of electric companies have somewhere in their systems equipment used for transmission of electric energy—it might be only a transmission line 100 feet long. The unlikelihood that an *entire* system can ever fall within the designation "facilities used in local distribution" is further emphasized by the view taken by the Court of Appeals in this case that such facilities begin only at some point after reaching the wholesaler to whom the company sells energy.

7. The proper approach, and one which we submit is necessary to give effect to all of the language of Part II of the Federal Power Act (16 U. S. C. sec. 824-824h), and

one which the Court of Appeals failed to follow and erred in so doing, is to:

a. Determine whether the Company is a "public utility" as defined in Section 201(e) of the Act (16 U. S. C. sec. 824(e)) for the purposes of the present litigation, i.e. with respect to whether it is a "public utility" as so defined so far as it pertains to the jurisdiction of the Federal Power Commission to regulate the rates for the particular sales of energy to the 6 Wisconsin wholesale customers here involved. *Connecticut Light & Power Co. v. Federal Power Comm.,* (1945) 324 U. S. 515, 522.

A company may be a public utility in respect to certain matters but not for others. *Connecticut Light & Power Co. v. Federal Power Comm.,* (1945) 324 U. S. 515, 525; *Jersey Central Power & Light Co. v. Federal Power Comm.,* (1943) 319 U. S. 61, 73, 74.

As electric energy flows from its source at the generator to the ultimate consumer there is necessarily a point where local distribution begins and the facilities after that point are "facilities used in local distribution." We submit sales at wholesale made in the area *after* local distribution begins are made by "facilities used in local distribution" and for that reason are not sales over which the Power Commission has jurisdiction. See *Connecticut Light & Power Co. v. Federal Power Comm.,* (1945) 324 U. S. 515, 528.

Cases involving accounting requirements or matters involving security issues must be distinguished from that here involving rates for sales to specific customers using particular facilities, since jurisdiction for such financial matters, if it exists, must necessarily be for the entire sys-

tem as contrasted to cases involving the filing of rates or making of charges for sales to particular customers, and we submit the court has squarely recognized such distinction. *Jersey Central Power & Light Co. v. Federal Power Comm.*, (1943) 319 U. S. 61, 73, 74; *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 515, 524.

b. Determine whether the particular facilities used to supply energy to the 6 Wisconsin wholesale customers are "facilities used in local distribution."

8. The basic error of the Court of Appeals from which flow various other erroneous propositions specified in the "Question Presented," is that *all* sales of electric energy in interstate commerce (irrespective of the facts of the particular case) for resale are beyond the constitutional powers of the States, even in the absence of Congressional action, by reason of *Missouri v. Kansas Natural Gas Co.*, (1924) 264 U. S. 298; *P. U. C. v. Landon*, (1919) 249 U. S. 236; *P. U. C. v. Attleboro S. & E. Co.*, (1927) 273 U. S. 83. We recognize that there are wholesale sales beyond the constitutional powers of the States such as involved in the above cases, but we deny that *all* sales at wholesale by that token alone are beyond the constitutional powers of the State. To say all sales at "wholesale" are only constitutionally subject to federal regulation is to make the case turn on a mechanical test which is erroneous. *United States v. South-Eastern Underwriters Assn.* (1943) 322 U. S. 533, 548-50. We rely on the Cooley formula (*Cooley v. Port Wardens*, (1851) 12 How. (U. S.) 299), and it is our position that where the wholesale sales in interstate commerce are purely local in character, as they are here and do not

affect the national interest, the States can regulate in the absence of conflicting Congressional action, but where such sales are of such a nature and magnitude and are made under circumstances so that such sales do not affect purely local matters so as to bring the case fairly within the doctrine of *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, and certain cases above cited, the States cannot regulate them. In deciding the *Attleboro* Case (273 U. S. 83) the Supreme Court applied the Cooley test (*Cooley v. Port Wardens*, 12 How. (U. S.) 299) whether the particular business there involved was essentially local or national in character (273 U. S. 83, 90) and concluded that the particular sales involved there affected the national interest.

If it is said that *all* sales at wholesale in interstate commerce affect the national interest and that the State of Wisconsin cannot constitutionally regulate *any* wholesale sale of electric energy in interest commerce and there can be no inquiry into the facts in each case to determine if the transactions there involved do or do not affect the national interest as required by the Cooley formula (as the Court of Appeals holds), then we would have a situation where federal regulation would have to be extended to every wholesale sale no matter how insignificant in fact. For example, in Wisconsin we have 3 public utilities, the West Dunkirk Electric Company serving 35 customers, the Fennimore Prairie Light and Power Company serving 14 customers, and Oliver Municipal Electric Utility serving 62 customers. Assume Wisconsin Michigan Power Company were to sell one or all of these companies electric energy generated outside of Wisconsin at wholesale. Could it pos-

sibly be said that the Commerce Clause of its own force prevents the State of Wisconsin from regulating such sales because they are "sales at wholesale"? How can it possibly be said that such sales are essentially national in character and effect the national interest just because they are "wholesale"? If it is held that such sales are beyond the constitutional power of the States, federal jurisdiction will certainly be extended to a multitude of transactions never before contemplated. The same comments would also apply in cases where a trailer camp operator or an apartment house owner purchases electric energy and sells to the occupants of the camp or the tenants which would be sales at wholesale.

The particular wholesale sales here involved to the 6 Wisconsin wholesale customers is about *half* of that sold to 28 *retail* customers off the same lines. How can it possibly be said such sales affect the "national interest"? The fact is they are entirely "local" in all respects and involve only the "local interest."

There is no possibility that Congress intended to preempt the entire field by passing Part II of the Federal Power Act (16 U. S. C. sec. 824-824h). The intent was to supplement state regulation. See *Connecticut Light & Power Co. v. Federal Power Comm.*, supra, and especially pages 525-6, 529-31 and 533 of 324 U. S. for details as to Congressional intent on this point.

9. Other errors of the Court of Appeals mentioned in "Questions Presented":

a. The errors on the point where "local distribution" commences or what constitutes "facilities used in local dis-

tribution" (paragraphs 8 and 9) also flow from the erroneous concept of constitutional law above mentioned. We submit "facilities used in local distribution" within the meaning of Section 201(b) (16 U. S. C. sec. 824(b)) include the 33 KV "loop" and 33 KV lines interconnected therewith and the 13.8 KV lines involved, for the reason such lines also serve retail customers who are the ultimate customers, which is "local distribution" pure and simple.

b. The error on the point that continued regulation of the rate for the identical sales of electric energy to the 6 Wisconsin wholesale customers by the State of Wisconsin here involved precludes Federal Power Commission jurisdiction, also is based on said erroneous concept of constitutional law above mentioned. We submit that the Wisconsin regulation of the rate for such sales precludes Federal Power Commission jurisdiction of the same subject matter on the following grounds: (1) Wisconsin can constitutionally regulate such sales; (2) the last clause of Section 201(a) of the Act (16 U. S. C. sec. 824(a)), coupled with clear statements of Congressional intent to the effect there was no intent to interfere or supersede state regulation, make it clear that Federal Power Commission was not to have jurisdiction where the States are exerting their regulatory powers; (3) the intent of Congress, when ascertained, is the law and must be given effect as such. *National Bank v. Matthews,* (1878) 98 U. S. 621, 626; *Hawaii v. Mankichi,* (1903) 190 U. S. 197, 212.

c. The error in holding sales to municipalities for resale are within the definition "sale of wholesale" in Section 201(d) (16 U. S. C. sec. 824(d)) arises from the refusal of the court to follow the clear and unambiguous language

in Sections 3(3), 3(4) and 3(7) which excludes a municipality from the word "person" in Section 201(d) and its refusal to follow the specific language in Section 201(f) (16 U. S. C. sec. 824(f).

d. The error in considering and adopting decisions construing the Natural Gas Act as controlling in construing Part II of the Federal Power Act arises from the fact (1) that the background and legislative history are different; (2) that there are differences in language between the two Acts; and (3) the respective Acts have received different constructions in important respects (particularly as to where "local distribution" begins) by the Supreme Court in *Connecticut Light & Power Co. v. Federal Power Comm.*, (1945) 324 U. S. 524, and *Federal Power Comm. v. East Ohio Gas Co.*, (1950) 338 U. S. 464. The effect of following the *East Ohio* Case in construing Part II of the Federal Power Act is to overrule the *Connecticut Light & Power* Case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 20, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 291

WISCONSIN MICHIGAN POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 294

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion and order of the Federal Power Commission (R. 367-384) is reported at 89 PUR (NS) 97. The opinion of the Court of Appeals for the Seventh Circuit (R. 451-463) is reported at 197 F. 2d 472.

JURISDICTION

The judgments of the Court of Appeals were entered on June 9, 1952 (R. 464, 465). The petition for a writ of certiorari in No. 291 was filed on August 25, 1952; the petition for a writ of certiorari in No. 294 was filed on August 26, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and under Section 313(b) of the Federal Power Act.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission has jurisdiction under Part II of the Federal Power Act over sales of electric energy at wholesale in interstate commerce, where made to municipalities.

2. Whether Wisconsin Michigan Power Company's sales of electric energy at wholesale are in interstate commerce, subject to regulation under Part II of the Federal Power Act, where the energy so sold is the product of an interstate system of integrated hydroelectric and steam plants and is composed of constantly varying amounts of interstate and intrastate energy determined by the availability of hydroelectric power and the power demands of the Company's customers.

3. Whether there is an implied exemption from the Federal Power Commission's jurisdiction over "sale of electric energy at wholesale in interstate commerce" for such a sale where it allegedly is a matter of local concern.

4. Whether the exemption contained in Section 201(b) for "facilities used in local distribution"

encompasses electric energy sales at wholesale in interstate commerce made by means of facilities which are also used for some retail sales.

5. Whether the Federal Power Commission's finding, that the Company since January 1, 1949 has been charging rates in excess of those on file with the Commission, is supported by substantial evidence.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U.S.C. 791a *et seq.*) are set out in the Appendix, *infra*, pp. 26-34.

STATEMENT

These cases were instituted in the court below by petitions under Section 313(b) of the Federal Power Act for review of an order of the Federal Power Commission issued June 1, 1951 (R. 367-384, 427-447). That order required the Company to cease charging rates other than those on file with the Federal Commission in sales of electric energy to certain distributors in Wisconsin and Michigan, who resell to ultimate consumers (R. 380-384). The pertinent facts may be summarized as follows:

The Company and its Operations. The Wisconsin Michigan Power Company (Company) is a Wisconsin corporation engaged in the production, transmission, distribution, and sale of electric energy in the States of Wisconsin and Michigan. In addition to making substantial retail sales, it served one wholesale customer in Michigan and

seven (now six) in Wisconsin; four of the latter are municipalities [1] which resell the energy to their residents. While the sales to these Wisconsin wholesale customers purportedly have been regulated by the Public Service Commission of Wisconsin, the Company, prior to the events here in question, had been filing with the Federal Power Commission all its rates for sales for resale with one exception, since 1937, when the Federal Commission held the Company to be a "public utility" in connection with the proposed merger of its facilities with those of another company and, hence, subject to the provisions of Section 203 of the Power Act (*Wisconsin-Michigan Power Company*, 1 F.P.C. 699-700).[2] (R. 83-84, T. 524, pp. 1, 12, 19, 27.)[3]

The Company operates in two divisions; a Northern Division and a Southern Division (R. 369). The Southern Division serves part of eastern Wisconsin and is located entirely in Wisconsin (R. 369, 370). The generating facilities of this Division consist of a steam plant at Appleton with a capability of 20,000 kw and hydro-plants at Appleton,

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[1] The four municipal customers are the cities of Clintonville, Shawano, New London and Kaukauna. The other two Wisconsin wholesale customers are the Oconto Electric Cooperative and Wisconsin Public Service Corporation. The Michigan wholesale customer is the Upper Peninsula Power Company.

[2] No judicial review of this determination was sought although Section 313(b) of the Power Act makes such review available.

[3] In addition, the Company otherwise indicated its intention to comply with rate schedule filing regulation and other regulations under the Power Act (R. 83-86; T. 1115-6).

Oconto Falls and Weyauwega, with an aggregate capability of 1,450 kw (R. 370). Its Southern Division facilities include aproximately 248 miles of 33 kv transmission lines, most of which form a loop extending north and west of Appleton and approximately 56 miles of 13.8 kv transmission lines connected to the loop (R. 370). From these 33 and 13.8 kv lines the Company delivered the energy sold to the six Wisconsin wholesale customers as well as the energy sold to its several large industrial consumers (R. 160-2, 370).

The Northern Division is located principally in Michigan and serves various areas in the Northern Peninsula of Michigan and adjacent areas in Wisconsin (R. 369-370). The generating facilities of this Division consist of a diesel station at Iron River, Michigan, and nine hydro stations with an aggregate capability of 57,310 kw (R. 370); all but one of these hydro stations are located on the Menominee River and its tributaries in Michigan, and four are operated under licenses issued by the Federal Commission under Part I of the Power Act (R. 370, 137). The Northern Division facilities include a network of 66 and 13.8 kv transmission lines emanating from Twin Falls, Michigan, with its only wholesale customer served through the 66 kv system but after step-down of the voltage to 6.9 kv (R. 370).

The two Divisions are not contiguous but are interconnected by means of a 132 kv transmission line 147 miles long extending from a substation at Twin Falls, Michigan, to the City Limits Substa-

tion at Appleton, Wisconsin (R. 369). By means of this 132 kv line and the 110 kv line of another company, the facilities of the two Divisions are linked together and operated as a single integrated and coordinated interstate unit (R. 371). This mode of operation, which is controlled by a dispatcher at Appleton, is designed to overcome deficiencies in generating capacity which exist at times in the respective Divisions to meet their load requirements and to make the most economical and efficient utilization of the Company's steam and hydro power resources (R. 371).[4] As a result of this coordination of operations, substantial amounts and percentages of Michigan-generated energy are delivered to the Southern Division for consumption in Wisconsin and vice versa (R. 371-2). At times of high river flow, the actual amount of Michigan-generated energy supplied to the Southern Division reached 81 per cent of the total used in that Division and, in like manner, in times of low river flow, the Wisconsin-generated energy supplied to the Northern Division in Michigan amounted to 77 per cent of that Division's total loads (R. 233, 240, 371-372). At any one moment it is possible that energy delivered to a customer in the Southern Division could be energy all generated in Michigan, all in Wisconsin or a commin-

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[4] To meet its over-all requirements, the Company's generation is supplemented by purchases of electric energy from other utilities located in both Wisconsin and Michigan. These purchases are coordinated with the Company's dispatching operation and scheduling of maintenance through an operating committee representing the utilities involved. (R. 371.)

gling of both (R. 164, 165, 173, 247; see Petition in No. 294, p. 8).[5] For the period from July 1948 to April 1950, Michigan-generated energy consumed in the Southern Division was, on the average, 17.4% of the total Southern Division's load, and the Wisconsin-generated energy consumed in the Northern Division amounted to 13.1%, on the average, of that Division's load (R. 284).

Events leading up to the Order of June 1, 1951. On March 17, 1945, the Company, at the suggestion of the Wisconsin Commission, put into effect a temporary "freeze" on the coal adjustment clause [6] contained in the special agreements with its wholesale customers filed with the Federal Commission as rate schedules, without, however, changing those agreements and without filing that "freeze" as a change in its rate schedules on file with the latter Commission (R. 377). On April 19, 1946, the Company filed amendments to its previously filed agreements reducing the coal clause adjustment by 1/3 (from .03 cents to .02 cents per kwh). The data accompanying those filings indicated that the coal adjustment clause had not been operating according to its terms as filed, but apparently was subject to a maximum of a .15 cents per kwh increase (R.

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[5] At times the Michigan-generated energy represented 94 per cent of the energy sold to one municipal wholesaler, 67 per cent of that sold to another and 80 per cent of the energy delivered to the remaining Wisconsin wholesale customers (R. 372). The percentage of Wisconsin energy on the Twin-Falls bus, through which Michigan wholesale customers receive its energy, was over 70 per cent on some days (R. 372).

[6] The coal adjustment clause made the rate charged vary according to the price of coal.

377-378). Upon inquiry by the Federal Commission by letter of May 1, 1946, "why the apparent maximum allowable increase * * * in the application of the fuel clause adjustment should not be specified as a provision to be included in the amendments to the agreements" (T. 1059), the Company on May 6, 1946 explained the circumstances that led to that maximum or "freeze" and stated that it was "not desirous of filing the temporary arrangement in the form of amendments to the special agreements" on file (R. 378, T. 1054-5). The Federal Commission, thereupon, included the statement regarding the freeze on the coal adjustment clause as part of the supplemental rate schedules and advised the Company that the supplemental rate schedules had been permitted to become effective as of May 23, 1946 (R. 378). This explanation was placed with each of the supplements filed on April 19, 1946 in the Federal Commission's file of the Company's FPC Rate Schedules, open for public inspection (R. 90-105, T. 1125).[7]

On April 8, 1949, the Company submitted for filing, as supplements to its filed rate schedules for sales to its wholesale customers, supplemental special agreements changing the then effective rates to them by, among other things, removing the "freeze" (R. 367, 378). After some of the customers protested, the Federal Commission suspended the proposed supplements pending hearing

[7] The "freeze" on the coal adjustment clause resulted in a saving of $314,000 to the Company's wholesale customers (R. 121-122).

(R. 367-8). Upon the Company's representation that it would file expeditiously an alternative rate proposal, the Federal Commission consented to the withdrawal of the proposed supplemental agreements expressly stating that it was "not consenting to any deviation from the rates * * * as filed with this Commission prior to the April 8, 1949 filings" (R. 368). Instead of filing an alternative rate proposal, the Company obtained from the Wisconsin Commission approval of increased rates which it has been charging the wholesale customers since January 1, 1949 (R. 368).[8]

On February 10, 1950, the Federal Commission issued an order directing the Company to show cause why the Federal Commission should not find the wholesale sales subject to its jurisdiction, and why the Company should not be ordered (1) to cease and desist from violating the Federal Power Act by charging rates other than those on file with the Federal Commission, and (2) to account for the difference between the filed rates and those actually charged (R. 1-6). After hearings before

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[8] The Company's bills rendered after July 1, 1949, bore the legend (R. 52-53):

> The rate structure utilized in the calculation of this statement, although approved by the Public Service Commission of Wisconsin on December 23, 1948, has been questioned by the Federal Power Commission. Each commission has claimed jurisdiction over the matter. A withdrawal, correction or modification of the rate may result and in such event, should the effect thereof be to lessen the amount of the charge herein made, you will be given appropriate refund.

The *same legend* was placed on the bills to the Michigan wholesaler for the deliveries made to it (R. 69-71).

an Examiner, submission of briefs and oral argument before the Commission, in all of which the Wisconsin Commission and the State of Wisconsin actively participated, the Federal Commission issued its order of June 1, 1951.

The Order of June 1, 1951. As to its jurisdiction over the Company's rates to its wholesale customers, the Federal Commission held that the Company's ownership and operation of the 132 kv transmission lines between the Northern Division in Michigan and the Southern Division in Wisconsin was in itself sufficient to make the Company a "public utility" subject to its jurisdiction under Part II of the Power Act (R. 369, 381). The Commission then found on the basis of the integrated operations described *supra*, pp. 4-7, that the Company's sales to its wholesale customers were sales in interstate commerce and the rates therefor were subject to its rate jurisdiction under Part II (R. 372, 382-383).

In so finding, the Commission rejected the various contentions advanced by the Company and the State of Wisconsin (1) that the energy lost its interstate character by virtue of being commingled with intrastate energy (R. 372-373); (2) that the energy's interstate character was terminated when the voltage was stepped down (R. 373-4); (3) that the sales were beyond its jurisdiction since they were made off facilities used in local distribution, excepted from Commission jurisdiction under Section 201(b) of the Act (R. 374-5); and finally (4) that interstate sales to municipalities for resale

were not "sales at wholesale" subject to its jurisdiction because of the definition of that term in Section 201(d) as "sale to any person for resale" and the exclusion of municipalities from the definition of "person" in Section 3 (R. 376).[9]

With respect to the Company's departure from the filed rates, the Federal Commission found that the statement submitted in 1946 regarding the "freeze" on the coal adjustment clause was properly to be treated as part of the Company's supplemental rate schedules. The Commission pointed out that the filing of such a statement was necessary to fulfill one of the purposes of the Act and the rules thereunder, namely, to have available for public inspection "full and complete rate schedules clearly and specifically setting forth all rates and charges for any transmission or sale of electric energy. 18 C.F.R. 35.3(a). Obviously, to have accepted the supplements for filing without inclusion of the statement respecting the 'freeze' would not have resulted in the filing of the actual rate

[9] In addition, the Federal Commission held that it also had jurisdiction over these sales by virtue of Section 20 of Part I of the Power Act, finding that there was no provision in either the Wisconsin or Michigan statutes authorizing the Commissions of those respective states to agree upon interstate rates, and hence, that the state commissions were "unable to agree" within the meaning of Section 20 (R. 375-376, 383). Section 20 of Part I provides that the Federal Commission shall have jurisdiction to regulate the sales in interstate commerce of energy generated at projects licensed under Part I "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or

with consequent violation of the Act" (R. 378). The Commission, accordingly, concluded that the legally filed rates since May 23, 1946, included the "freeze"; hence that the lifting of the limitation in January 1949, without filing any provision therefor, resulted in an unauthorized upward change in the rates to the wholesale customers (R. 378). In view of this conclusion the Commission directed the Company to establish a reserve sufficient to assure the refunding to the wholesale customers of the excess over the legally filed rates in the event of a withdrawal, correction or modification of the rate charge since January 1, 1949 (R. 379, 384).[10]

After their petitions for rehearing were denied by the Federal Commission (R. 385-425, 426), petitioners sought review in the court below (R. 427-447). That court denied the petitions for review and affirmed the Federal Commission's order (R. 451-465).

DISCUSSION

1. The first question raised in No. 291,[11] *i.e.*, whether the definition in Section 201(d) of wholesale sale as "a sale * * * to any person for resale," coupled with the definition of "person" in Section 3, operates to deprive the Federal Com-

charges of payment therefor, * * *." See Appendix, *infra*, pp. 27-28.

[10] The order required the Company to set up a special accounting reserve to cover its contingent liability for the portion of the rates charged those seven customers in excess of filed rates, and to submit a statement of its plans, if any, for disposition of the amount to those entitled thereto (R. 384).

[11] Petitioners in No. 294 also raise this question as No. 5 of "Questions in addition to the above which petitioners will raise if certiorari is granted." See Petition in No. 294, p. 5.

mission of jurisdiction of the Company's interstate wholesale sales to municipalities [12] (Petition in No. 291, pp. 2, 11-16), is also involved in *United States* v. *Public Utilities Commission of the State of California* and *The County of Mineral, State of Nevada* v. *Public Utilities Commission of the State of California,* pending on petitions for writs of certiorari to the Supreme Court of the State of California, Nos. 205, 206, this Term. As is pointed out in the petition in No. 205, pp. 13-18, we believe that the court below in the instant case correctly held that the definitions contained in Section 201(d) and Section 3 were not intended to exclude from the Federal Commission's jurisdiction any sale by a "public utility" of electric energy for resale in interstate commerce because of the status of the wholesale buyer, and that the inclusion of "person" in the definition of wholesale sales do not require a contrary conclusion (R. 461). However, since the decision below conflicts with that of the Supreme Court of California on this point, we do not oppose the granting of certiorari limited to this question, if certiorari is granted in No. 205.

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[12] Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(3) 'corporation' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined;

(4) 'person' means an individual or a corporation;

* * * * *

2. Review of the other jurisdictional questions raised by petitioners is not warranted [13] since the rulings of the court below therein are not only correct but are fully in accord with the decisions of this Court.

(a) The contention advanced in No. 291, that the Federal Commission has no jurisdiction over the Company's wholesale sales because the admittedly interstate energy furnished in such sales is commingled with intrastate energy (Pet. in No. 291, pp. 16-17), has already been rejected by this Court in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, where the facts were virtually identical to those of the present case. In the *Penn Water* case, the operations of hydroelectric plants on the Susquehanna River in Pennsylvania were integrated with steam plants

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[13] It is significant that since 1937 when the Federal Commission held the Company to be a "public utility" subject to its jurisdiction under Section 203 of the Power Act (*Wisconsin-Michigan Power Company*, 1 F.P.C. 699-700), the Company, without seeking review of this determination, has been filing rate schedules for its wholesale service with the Federal Commission. Petitioners in No. 294 try to overcome this long acquiescence by urging that a company may be a public utility for some purposes under the Act but not for others (Pet. in No. 294, p. 16). As the Federal Commission held, however, the Act clearly provides that a determination of "public utility" status is effective for all purposes under the Act although a " 'public utility' may or may not be subject to regulation under a particular section of Part II depending on whether the section by its terms applies." (R. 370). *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, and *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, far from holding to the contrary as petitioners contend (Pet. in No. 294, p. 16), support the Federal Commission's construction. See 319 U.S. at 73-74; 324 U.S. at 524-5, 532-3.

in Baltimore, Maryland, and electric energy was transmitted between the states in accordance with the availability of hydroelectric power and the needs of the system's customers in both Pennsylvania and Maryland in order to achieve optimum and most economical usage of the integrated facilities without regard to state lines. "During periods of low flow, Penn Water receive steam-generated energy from Baltimore in order to meet its power supply commitments. Conversely, during periods of high flow, Consolidated is able to receive the cheaper hydroelectric power from Penn Water and Safe Harbor." (343 U.S. at 419.) In view of these circumstances, this Court ruled that, despite the fact that about 83% of the energy furnished by Penn Water to customers in Pennsylvania was generated in Pennsylvania, the Federal Commission "has complete authority to regulate all of this commingled power flow. The Commission's power does not vary with the rise and fall of the Susquehanna River." (343 U.S. at 420).[14]

The *Penn Water* ruling requires the same conclusion here. For here, too, there is integration of hydroelectric plants in one state with steam plants in another state and the flow of energy across state lines and its mixture in the energy sold for resale is governed by the flow of the Meno-

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[14] See, also *Safe Harbor Water Power Co.* v. *Federal Power Commission*, 179 F. 2d 179 (C.A. 3), certiorari denied, 339 U.S. 957; *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298; *Public Utilities Commission* v. *Landon*, 249 U.S. 236; *Kentucky Natural Gas Corp.* v. *Public Service Commission*, 28 F. Supp. 509 (E.D. Ky.), affirmed, 119 F. 2d 417 (C.A. 6).

minee River and the needs of the system's customers, *supra,* pp. 5-7. Here, also, there are times during high river flow, when the energy furnished to the Wisconsin wholesale customers in one state consists principally of Michigan energy, as well as times, during low river flow, when the energy supplied in Michigan is principally generated in Wisconsin, *supra,* p. 6. And because of coordination of facilities to achieve most economical and maximum utilization, it is possible at any one moment that energy delivered to the wholesale customers, particularly those in Wisconsin, is all interstate, all intrastate, or a commingling of both, *supra,* pp. 6-7. Indeed, by coincidence the 83% average figure of Wisconsin-generated energy consumed in Wisconsin (*supra,* p. 7) is the same as the Pennsylvania-generated energy consumed in Pennsylvania in the *Penn-Water* case. The critical facts here are thus on all fours with those in *Penn Water.* The Federal Commission's jurisdiction over wholesale sales no more "varies with the rise and fall" of the Menominee River than it does with fluctuations of the Susquehanna.

(b) Petitioners also contend that because of the Company's comparatively large volume of retail sales, its sales at wholesale are primarily a matter of local concern subject to state regulation and hence not within the Federal Commission's jurisdiction under the Power Act (Pet. in No. 291, pp. 17-19; Pet. in No. 294, pp. 2-4, 11-14). But this Court, in construing the substantially parallel

language of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 *et seq.*,[15] has negated the possibility that there might be some wholesale interstate sales to local distributors not subject to the jurisdiction of the Federal Commission by repeatedly ruling that the division of regulatory jurisdiction between state and federal governments provided by that Act was "sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 517. "Congress occupied only a part of the field. As to sales, only the sale of gas in interstate commerce for resale was covered. Direct sales for

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[15] In general the Natural Gas Act applies to transportation in interstate commerce, to sale in interstate commerce for resale, and to companies engaged in such transportation or sale, while local distribution, the facilities therefor, and production and gathering are expressly excepted (Section 1(b)). The Power Act, Part II, applies to transmission in interstate commerce, sale in interstate commerce for resale, and to companies owning or operating facilities for such transmission or sale, while facilities used in local distribution, or for generation, transmission in intrastate commerce, or transmission of energy consumed wholly by the transmitter, are expressly excepted (Sections 201(b)-201(e)). Although the Power Act adds the intermediate step of ownership or operation of facilities, jurisdiction is ultimately determined under both Acts upon substantially the same basic considerations. This Court has recognized this fact and has utilized cases involving either electric energy or natural gas in both kinds of cases. See, e.g., *Public Utilities Commission* v. *Attleboro Co.*, 273 U.S. 83, 89; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506, 507; *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, 69; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 472-474. See also *Federal Power*

consumptive use was designedly left to state regulation." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329, 334; cf. *Public Utilities Commission* v. *United Fuel Gas Co.,* 317 U.S. 456, 467.

The legislative history of the Power Act is clear that Congress intended the same division of jurisdiction under that Act. Prior to the enactment of the Power Act, this Court had ruled that while the states could regulate retail sales in interstate commerce (*Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U.S. 23), they could not constitutionally regulate wholesale interstate sales to local distributors of gas (*Missouri* v. *Kansas Gas Co.,* 265 U.S. 298, 308), or electric energy (*Public Utilities Commission* v. *Attleboro Co.,* 273 U.S. 83).[16] The *Attleboro* case was regarded as having "placed the interstate wholesale transactions of the electric utilities entirely beyond the reach of the States", and it was the resulting gap as so understood which the Power Act was intended to fill. S. Rep. No. 621, 74th Cong., 1st Sess., p. 17; cf. H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7-8, 27; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U.S. 498; *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U.S. 464, 472-473.

Commission v. *Arizona Edison Co.,* 194 F. 2d 679, 682, and fn. 5 (C.A. 9).

[16] In the *Attleboro* case the Court held unconstitutional Rhode Island's attempt to regulate a sale at wholesale of electric energy generated in Rhode Island and distributed and consumed in Massachusetts, over Rhode Island's contention that such regulation was a necessary incident to

Petitioners' claim, that there are wholesale interstate sales to local distributors which are not national in character and hence may be regulated by the states under the doctrine of *Cooley* v. *Board of Wardens*, 12 How. 299 (Pet. in No. 294, p. 17), ignores the fact, among others, that in passing the Federal Power Act, Congress was acting in the light of the constitutional doctrines set out in the *Attleboro* case. Cf. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, *supra*, at 502-3, 506, 508; *Federal Power Commission* v. *East Ohio Gas Co.*, *supra*, at 472. And since Congress by the Act has adopted the wholesale-retail distinction of the *Pennsylvania Gas* and *Attleboro* cases, there is no basis for the claimed necessity of balancing state and federal interests in determining jurisdiction over a particular wholesale interstate transaction. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, *supra*, at 506.[17]

(c) This Court's decision in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 404, disposes of petitioners' attempt to argue that the facilities here involved fall within the exemption contained in Section 201(b) for "facilities used in local distribution" and, hence that these sales are impliedly exempted because made by means of such facilities (Pet. in No. 294, pp. 4-5, 14-15).

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effective regulation of the selling company's predominantly local business.

[17] The fact that with the Company's acquiescence, the Wisconsin Commission has regulated the Company's wholesale sales in interstate commerce for a long time, of course,

Here, the facilities allegedly within the statutory exemption have been designated by the Company itself as transmission lines; they are high voltage lines operating between Michigan and Wisconsin as well as within those states, are the transmission backbone of the Company and are used for the purpose of transmitting energy in bulk from points of generation to the points where it is sold in bulk for resale, as well as to large industrial customers (R. 374-375). In the *East Ohio* case, where there was a pattern of gas pipelines in Ohio, substantially the same as the Company's transmission system here,[18] the Court held that East Ohio's pipelines were not used in local distribution, pointing out that the exemption embraced "equipment for distributing gas among consumers *within a particular local community.*" (italics supplied) (338 U.S. at 469-470).[19] See, also *Federal Power Commission* v. *Arizona Edison Co.*, 194 F. 2d 679, 681-2 (C.A. 9). Clearly, the facilities here involved do not fall within the definition of "facilities used in local distribution."

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does not prove the existence of power so to regulate as a constitutional matter. Cf. *Federal Power Commission* v. *East Ohio Gas Co.*, *supra*, at 471-2.

[18] The only material factual differences between the two cases are that East Ohio made no sales for resale, and that its pipelines were all within the State of Ohio.

[19] *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, relied on by petitioners, does not support their position on this question. The Company's facilities in its Bristol Division there involved did not include any transmission lines like those in the present case; all that was involved was a step-down substation at the end of the transmission lines of another company. Moreover, the Court remanded the case to the Federal Commission to find whether that facility was used in local distribution. Here,

Moreover, even if the facilities from which the sales were made were used in local distribution, it does not follow that the sales themselves would be within the exemption. For, as the Commission pointed out, "nothing in the Act makes our jurisdiction under Part II over sales of electric energy dependent upon the nature of the facilities involved in effecting the sale. * * * Under the statute the nature of facilities only applies to the determination of the status of an electric company as a 'public utility' under Part II." (R. 374.) Thus, the petitioners' position is based on the fallacious assumption that the Federal Commission's jurisdiction over sales depends on the nature of the facilities from which the sales are made, whereas in fact the converse is true and the character of the sales determines the status of the facilities from which they are made.

Nor does the circumstance that there is a step-down in voltage (from 66 kv. to 6.9 kv. in the case of the Michigan wholesale customers)[20] prior to delivery make the sale one in local distribution. This voltage step-down does not interrupt the continuity of transmission in interstate commerce, for it is made for the purpose of economy and practicability of transmission (R. 130-131). In dealing with analogous changes in pressure in the transmission and sale of natural gas, this Court has been careful to point out that the allocation of jurisdic-

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on the other hand, the Commission has found that the lines were not used in local distribution (R. 382).

[20] The Wisconsin wholesale customers are served from the Company's 33 and 13.8 kv. transmission lines, *supra*, p. 5.

tion between the federal and state governments is not determined by the mere reduction of pressure under which the gas is being transported. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 509; *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 626; see also *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 689. In the *Interstate* case, this Court held that the increase in pressure "must be regarded as merely an incident in the interstate commerce rather than as its origin" (331 U. S. at 689); so also here, the step-down in voltage was merely an incident in interstate commerce and not the termination of the interstate journey.[21]

3. The Federal Commission's holding that since January 1949 the Company has been charging rates in excess of those on file with the Commission, questioned in the Petition in No. 291 (Pet. in No. 291, pp. 2, 21-25), was properly affirmed by the court

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[21] There is no substance to petitioners' attack on the Federal Commission's holding, which the court below did not find it necessary to pass upon, that it also had jurisdiction over these sales by virtue of Section 20 of Part I of the Power Act. The statutes of Michigan and Wisconsin do not contain authorizations to their respective state commissions, comparable to those of the Maryland and Pennsylvania Commissions involved in the *Penn Water* case and in *Safe Harbor Water Power Co.* v. *Federal Power Commission*, 179 F. 2d 179, (C.A. 3), certiorari denied, 339 U.S. 957, requisite to empower them "to enforce the requirements" of Section 20, *i.e.*, to agree upon rates for hydroelectric energy sold in interstate commerce. Moreover, the Commission's finding that the Commissions were "unable to agree" as required by Section 20 as a predicate for action by the Commission is in line with the holding in the *Safe Harbor* case (179 F. 2d at 191-2).

below (R. 462-463) and likewise does not warrant review by this Court. The Commission's finding on this question, which turns upon whether the 1946 "freeze" of the coal adjustment clause became part of the Company's filed schedules, is supported by substantial evidence and hence conclusive. Section 313(b) of the Power Act. The issue is in large part factual, and turns on the circumstances of this particular case.

On this issue, the record before the Federal Commission shows that while the Company advised the Federal Commission that it "was not desirous of filing the temporary arrangement *in the form of amendments to the special agreements*" on file (italics supplied) (R. 378, T. 1054-5), the Company's vice-president and general manager testified that the Company's explanatory letter of May 6, 1949,[22] was intended to and was understood to constitute a part of its filings with the Federal Commission (R. 141-142). Moreover, as a result of the Commission's inclusion of the "freeze" as a part of the filed supplemental rate schedules which became effective as of May 23, 1946, the Company was placed in a position of being able to leave the "freeze" in effect without thereby violating the requirements of the Act that all rates charged be

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[22] Referring to his prior statement that the May 6, 1946 letter "was an explanation of why we did not regard a filing necessary, a formal filing" (R. 141), the Company's vice-president and general manager stated, in answer to the question whether he assumed that the explanation had been submitted to the Commission for its information, but not filed with it, "No, I make no such distinction, * * *" (R. 142).

filed with the Federal Commission (Section 205 (c)). Not only did the Company thus receive the benefits of the Commission's action, but in initiating the 1949 rate changes which it subsequently withdrew, the Company filed a change to remove the "freeze", thereby manifesting its recognition that the freeze had become a part of its filed schedules. In these circumstances, there can be no doubt that the Commission properly held that the freeze had become part of the Company's filed rates (cf. *Berwind-White Coal Mining Co.* v. *Chicago & Erie Railroad,* 235 U.S. 371), and consequently that the removal of the ceiling in computing rates in 1949 without an appropriate additional filing resulted in the Company's making charges in excess of its filed rates.[23]

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[23] The Company's claim that the Federal Commission's requirement that it establish reserve for the contingent liability resulting from these overcharges should have taken into account undercharges from March 1, 1945 (effective date of the freeze) to May 23, 1946 (when the freeze became effective as a part of a rate schedule) (Pet. in No. 291, pp. 24-25), is premature. The Commission has not undertaken to pass on any question as to disposition of the reserve. See *supra,* p. 12, fn. 10.

CONCLUSION

We do not oppose the granting of certiorari limited to question No. 1 in the Petition in No. 291 if certiorari is granted in *United States* v. *Public Utilities Commission of the State of California*, No. 205. As to the other questions, the decision below is fully in accord with the decisions of this Court, and there is no need for further review.

Respectfully submitted,

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OCTOBER 1952.

APPENDIX

The pertinent provisions of the Federal Power Act (Title II of the Public Utility Act of 1935, c. 687, 49 Stat. 803, 838, 16 U.S.C. 791a *et seq.*) are as follows:

SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * * * *

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

* * * * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * * * *

SEC. 19. That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distribut-

ing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided,* That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter.

SEC. 20. That when said power or any part thereof shall enter into interstate or foreign

commerce the rates charged and the service rendered by any such licensee, * * * shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, * * * jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce * * *.

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, how-

ever, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities sub-

ject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

SEC. 202. * * *

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to ren-

der adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them.

* * * * *

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules show-

ing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the

Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

* * * * *

SEC. 207. Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided,* That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

* * * * *

SEC. 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and

regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. * * *

* * * * *

SEC. 313. * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objec-

tion shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 291

WISCONSIN-MICHIGAN POWER COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Reply Brief of Petitioner in Support of its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

1. The principal purpose of this reply brief is to call to the Court's attention the case of *State of Wisconsin and Public Service Commission of Wisconsin vs. Federal Power Commission,* (No. 11224), which is pending before the United States Court of Appeals for the District of Columbia Circuit. The case has been orally argued before the Court, and a decision has not yet been rendered.

One of the principal issues involved in this case, as in the instant case, is whether a sale of interstate energy at wholesale to a municipality is within the jurisdiction of

the Federal Power Commission under Section 201 of the Federal Power Act. The case is a petition for review of an order of the Federal Power Commission in which it was determined that the Commission did have jurisdiction over such sales. (*In the Matter of Interstate Light and Power Company (Wisconsin) and Wisconsin Power and Light Company,* Docket No. E-6252, July 21, 1951, rehearing denied August 27, 1951).

The Public Utilities Commission of California has ruled directly to the contrary, (50 Cal. P.U.C. 749), and the Supreme Court of the State of California entered an order denying a writ of review on January 21, 1952, (unreported). The decision of the California Commission is now the subject of two petitions for a writ of certiorari pending before this Court. (*The United States of America vs. The Public Utilities Commission of the State of California and the California Electric Power Company,* No. 205, and *The County of Mineral, State of Nevada vs. The Public Utilities Commission of the State of California, and The California Electric Power Company,* No. 206).

Here we have an important issue of law vitally affecting almost every electric utility of any substantial size in the country. Such issue has been decided one way by the Supreme Court of California and just the opposite by the Court of Appeals for the Seventh Circuit. The same issue is now pending before the Court of Appeals for the District of Columbia. It will undoubtedly arise in other courts unless this Court grants certiorari and determines the question once and for all.

2. The Federal Power Commission at pages 14-16 of its brief in opposition contends that the critical facts in the case of *Pennsylvania Water & Power Co. vs. Fed-*

eral Power Commission, 343 U.S. 414, are on all fours with the facts in the instant case with respect to the question of Federal Power Commission jurisdiction over the sale of the electric energy (aside from the issue of sales to municipalities). We submit that it does not appear in the *Penn Water case* that the electric energy as it crossed the State line was immediately transformed to a much lower voltage preparatory to being sent out over the loop line, as are the facts in the instant case. It is the contention of the petitioner that such factor is critical in that it marks the end of the interstate journey, as was held in *South Carolina Power Co. vs. South Carolina Tax Commission,* 52 F. 2d 515, 525, affirmed 286 U.S. 525, 76 L. ed. 1268.

CONCLUSION

Wherefore, we request that this Court grant certiorari to review all of the issues as set forth in the petition.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 291

WISCONSIN-MICHIGAN POWER COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Reply Brief of Petitioner in Support of its Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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